

COVID-19 at the International Criminal Court

Brazil's health policy as a crime against humanity?

Tobias Ackermann

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On 27 July 2020, an umbrella group of Brazilian unions and social organizations filed [a criminal complaint](#) with the International Criminal Court (ICC). In the complaint, the group that represents more than one million Brazilian medical professionals urges the Office of the Prosecutor to start investigations into the President of Brazil, Jair Bolsonaro. They allege that his (non-)handling of the coronavirus pandemic constitutes a “crime against humanity”. After giving some background information on the situation in Brazil, this Bofax shows that the high legal threshold of a crime against humanity is not met in the present case. Recalling that international criminal law and the ICC are concerned only with the most egregious crimes, it argues that the recent complaint could contribute to a false image of the ICC. Instead, the failure of Bolsonaro’s health politics must be framed as a human rights issue.

Brazil and the pandemic

Brazil’s failure to respond to the pandemic is well-documented (see [here](#) and [here](#)). The country has the second highest numbers in confirmed COVID-19 cases and in deaths. Data from the [Johns Hopkins University](#) currently shows over 3.1 million reported infections and over 104,000 deaths. Bolsonaro has repeatedly downplayed the significance of the virus, ignored urges to wear a protective mask, and spread misinformation about the nature of the virus as well as its potential treatment through social media channels. For Bolsonaro, preventing an economic crisis – which would, it is feared, follow from lock-down measures – weighs heavier than all public health concerns. Other episodes of Bolsonaro’s policy include the appointment of members of the military to high-ranking positions within the Ministry of Health, including the minister, without previous medical expertise. At the beginning of July, the far-right President even vetoed two laws, restricting the introduction of a general obligation to [wear face masks](#) in public and stopping a programme to [protect indigenous peoples](#) from the virus.

A crime against humanity?

From the outset, it is more than difficult to imagine the Prosecutor of the ICC to begin investigations into Bolsonaro. The claim of a “crime against humanity” appears far-fetched. But before addressing the legal merit of this allegations, a few words on the Court’s procedure are appropriate. Non-state groups, such as the Brazilian authors of the criminal complaint, cannot initiate investigations themselves. They may, however, provide information to the ICC Prosecutor who, in turn, selects cases on her own initiative. Under Article 15(1) of the Rome Statute, she “may

initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.” If she deems the information received serious enough to conclude that there is, per Article 15(3) of the Rome Statute, “a reasonable basis to proceed with an investigation”, the Prosecutor submits a request for authorization of an investigation to the Pre-Trial Chamber.

What are the chances of the prosecutor taking up the case? First, it should be noted that neither territorial nor personal jurisdiction of the Court is an issue. Brazil is a member State of the Rome Statute and acting heads of states do [not enjoy immunity](#) before the ICC. The principle of subsidiarity enshrined in Article 17 of the Rome Statute, on the other hand, could be a real obstacle. The ICC may only admit a case when the State, which has jurisdiction over that case, is unwilling or unable genuinely to carry out the investigation or prosecution. Whether Brazilian authorities are unwilling, however, appears questionable in light of [other ongoing investigations](#) against the President.

Setting this issue aside, the crux of the case is whether the alleged conduct of Bolsonaro could fall within the jurisdiction *ratione materiae* of the Court or, in other words, whether it could qualify as a crime against humanity. According to the complaint, Bolsonaro’s “attitude of contempt, neglect, and denial, has brought disastrous consequences, with the resulting intensification of the spread of the illness, completely straining the health services, which were unable to meet the minimum conditions to assist the population, causing deaths without further controls.”

Without artificially prolonging the analysis, it is helpful to recall the relevant legal yardstick. Article 7(1) of the Rome Statute defines “crime against humanity” as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” and lists, under *litera k*, the catch-all provision of “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

Importantly, the notion of “attack”, despite its connotation, does not require the act in question to constitute a military attack. Article 7(2)(a)) of the Statute merely defines it very broadly as a “course of conduct”. Notably, in [Akayseu](#), the International Criminal Tribunal for Rwanda noted that an “attack may also be non violent in nature, like imposing a system of apartheid” (para 581). This suggests that State policies could very well constitute an “attack”. Certainly, Bolsonaro’s actions and inactions are part of a widespread and systematic course of conduct, potentially affecting the entire Brazilian population. One might even argue, in light of Brazil’s number of cases and deaths, that the administration’s failure to adopt measures to mitigate against the pandemic causes “great suffering” and “serious injury” to physical health. On the other hand, while a fish rots from the head down, not every failure, such as those based on structural problems within the Brazilian health system, can be traced back to Bolsonaro who came into office only on January 1, 2019. What is more, the responsibility of the individual citizen to adhere to hygiene and social distancing rules, even if difficult for people who live in poverty and dense settlements, must also be taken into account.

That being said, the lack of effective State responses to the pandemic remains a crucial factor for the worsening of the situation. It appears conceivable that disastrous political failures could amount to “inhumane acts” in principle. The ICC’s Pre-Trial Chamber [noted](#) in 2008 that such acts may indeed be found in “serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law” (para 448). Human rights are arguably violated in Brazil due to the administration’s passive stance towards the virus. For instance, Article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Brazil is a party, expressly requires States to take steps to treat and control epidemic diseases. Yet, these violations do not amount to a level serious enough to qualify as acts of similar nature and gravity as other acts referred to in Article 7(1) of the Rome Statute. As the ICC [emphasized](#), the residual notion of other inhumane acts “must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity” (para 269).

Lastly, criminal liability requires a *mens rea* element. The perpetrator must have acted intentionally to inflict great suffering or serious injury as well as have been aware of the factual circumstances that establish the “similar nature” of the conduct in question. To recall, the complaint invokes Bolsonaro’s “contempt, neglect and denial.” Negligence, however, is not intent. Apart from the question of whether Bolsonaro actually believes in the things he does and says, his misguided politics, despite their recklessness and adverse effects on the population, arguably do not constitute an attack launched intentionally against the population.

Between symbolism and misconceptions

However futile it might be in the end, the complaint, together with the international media echo it has created, says something about the somewhat peculiar public perception of the ICC and international criminal law more generally. On the one hand, the complaint and allegation of a “crime against humanity” send a strong symbolic message. The very idea of the ICC’s involvement appears to increase public awareness and pressure. For Brazil, the complaint could contribute to its administration’s increasingly disastrous internal and external image that could, ultimately and hopefully, lead to a change in policy. The pressure on Bolsonaro is already high – not only because of his (non-)response to the coronavirus (see, e.g., [here](#)). What is more, the fact that the union group chose to address the ICC could be interpreted as a positive sign toward an increasingly positive public image of the Court. At second glance, however, such an image could turn out to be quite detrimental to the Court. The Prosecutor can only but disappoint hopes and projections created by such “criminal complaints”, potentially fostering the image of the Court as a passive and, ultimately, failed institution.

A human rights issue

International criminal law is not a last resort to scrutinize domestic politics and failures in leadership. This is not the mandate of the ICC. It is, instead, concerned with individual criminal responsibility for some of the worst crimes imaginable. This is not to suggest, however, that the situation in Brazil is a purely domestic issue.

On the contrary, the severe impact of Bolsonaro's disastrous health policy on the most vulnerable members of society makes it a serious human rights concern. Recognizing the manifold human rights law implications of the pandemic and framing political failures not as criminal but as human rights violations not only stands on legally sound ground but also offers institutional advantages. States are, as the [Committee on Economic, Social and Cultural Rights](#) recently stressed, under an obligation to take measures to prevent or at least to mitigate, the adverse impacts on the enjoyment of human rights, including the right to health. In particular, it noted that "States should take a range of urgent measures. In particular, responses to the pandemic should be based on the best available scientific evidence to protect public health" (para. 10). There is a strong case that the Brazilian government has not adopted such responses and thus violated human rights enshrined in both the American Convention on Human Rights and the ICESCR. The Inter-American Human Rights system is, therefore, much more promising than a letter to The Hague. Both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have the authority to request, in urgent cases, precautionary or provisional measures. In the context of the pandemic, the Commission already [adopted](#) precautionary measures in favour of indigenous peoples, requesting Brazil to adopt the necessary measures to protect the rights to health, life and personal integrity of the members of these peoples.

The recent criminal complaint is limited to signalling public outcry. It will disappear into thin air at the Prosecutor's office. Problematically, this could not only devalue the court in the eyes of the public, but also bolster Bolsonaro's position. A more promising avenue is to frame Brazil's policy failures as a human rights issue. Combined domestic and international pressure is needed to counter the misguided policies of far-right politicians, not only in Brazil. And a human rights-based narrative and reliance on human rights institutions, such as the Inter-American Human Rights system, are more suitable to facilitate such pressure. Rather than focussing on an individual perpetrator, human rights law is concerned precisely with the protection of individuals from the acts and omissions of States. Civil society and international actors would do well to focus their efforts on reminding Bolsonaro of this.

Tobias Ackermann is a legal clerk at the Kammergericht, Berlin, and a PhD student and former research associate at the Institute for International Law of Peace and Armed Conflict (IFHV), Ruhr University Bochum.

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